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Supreme Court, U.S.
FILED
OCT 20 2003
OFFICE OF THE CLERK

No. 03-254

In the Supreme Court of the United States

CORE CONCEPTS OF FLORIDA, INCORPORATED,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Federal Prison Industries, Inc., is a non-appropriated funds instrumentality for purposes of the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 327 F.3d 1331. The opinion of the United States Court of Federal Claims (Pet. App. 17a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2003. A petition for rehearing was denied on June 17, 2003 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on August 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the Court of Federal Claims' jurisdiction under the Tucker Act, 28 U.S.C. 1491, and the effect of the "non-appropriated funds" doctrine on that jurisdiction.

1. The Tucker Act gives the Court of Federal Claims jurisdiction over (among other matters) certain contract claims against the United States. In particular, 28 U.S.C. 1491(a)(1) provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491(a)(1).

Section 2517(a) of Title 28 provides that, except "as provided by the Contract Disputes Act of 1978, every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any *general appropriation* therefor." 28 U.S.C. 2517(a) (emphasis added). The Court of Federal Claims, the Federal Circuit, and their predecessor courts have construed Section 2517(a) as limiting the Court of Federal Claims' jurisdiction under the Tucker Act to those cases in which *appropriated funds* can be used to pay any resulting judgment. See *Furash & Co.* v. *United States*, 252 F.3d 1336, 1339 (Fed. Cir. 2001). Consequently, if Congress "intended to separate the agency" at issue "from general federal revenues" and to avoid obligating the United States to pay claims against it, Tucker Act jurisdiction is lacking. See *id.* at 1339;

see also *United States* v. *Hopkins*, 427 U.S. 123, 125 (1976).

Before 1970, the Claims Court applied the non-appropriated funds doctrine to hold that the Tucker Act does not authorize suit against various non-appropriated funds instrumentalities or "NAFIs," see, *e.g.*, *Kyer* v. *United States*, 369 F.2d 714, 716 (Ct. Cl. 1966), cert. denied, 387 U.S. 929 (1967), including military post exchanges or PXs, *e.g.*, *Borden* v. *United States*, 116 F. Supp. 873 (Ct. Cl. 1953); *Hughes Aircraft Co.* v. *United States*, 534 F.2d 889, 907 (Ct. Cl. 1976) (citing cases). For example, in *Kyer*, *supra*, the Court of Claims concluded that it did not have jurisdiction over a contract claim against the Grape Crush Administrative Committee, an instrumentality acting under the Secretary of Agriculture's direction. The fact that the Committee was an instrumentality of the United States, the court explained, was not by itself sufficient to sustain jurisdiction. "To be actionable in this court, that contract must be one which, in the contemplation of Congress, could obligate public monies. * * * If Congress has indicated that public funds shall not be involved," the court "cannot grant the relief requested." 369 F.2d at 718. The *Kyer* court concluded that the Committee could not obligate public monies because Congress had established it as part of a "self-funding scheme" financed by assessments on producers rather than appropriations of general federal funds. *Ibid.* "[P]ublic funds were not made available to the Committee nor was the Committee in any sense authorized to obligate such funds. Therefore, the contract can not now be satisfied from an appropriated source." *Id.* at 719.

In 1970, Congress amended the Tucker Act to make the United States liable for the actions of certain non-appropriated fund instrumentalities, primarily PXs.

Act of July 23, 1970, Pub. L. No. 91-350, § 1, 84 Stat. 449. The Tucker Act thus now provides that "an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States." 28 U.S.C. 1491(a)(1); see 31 U.S.C. 1304(c)(1) and (2) (providing that those exchange services and councils "shall reimburse the government" for any judgments arising out of their express or implied contracts). Congress, however, declined to extend the Tucker Act to other non-appropriated fund instrumentalities. See *McDonald's Corp.* v. *United States*, 926 F.2d 1126, 1132 (Fed. Cir. 1991) ("Congress indicated its intention to limit the waiver of sovereign immunity" in the Tucker Act "to a specific category of military organizations funded by resale activities which rendered them solvent and therefore able to support an adverse judgment without risk to the general treasury.").

2. a. Federal Prison Industries, Inc. or FPI (also known by the trade name UNICOR) is a government-owned, District of Columbia corporation created by the Act of June 23, 1934, ch. 736, § 1, 48 Stat. 1211, to provide industrial employment and training opportunities to inmates of the Federal Bureau of Prisons. 18 U.S.C. 4121; 28 C.F.R. 345.11(a); see 28 U.S.C. 509. FPI "is entirely self-sufficient—no taxpayer monies are used to operate it." H.R. Rep. No. 1048, 106th Cong., 2d Sess. 112 (2001); see also H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 141 (1990) ("FPI is self-sufficient and does not receive any appropriation."); *In re Donation Under 40 U.S.C. 484(j) of Surplus Pers. Prop. of Fed. Prison Indus., Inc.*, 60 Comp. Gen. 323, 326 (1981).

FPI's enabling statute establishes a segregated Federal Prison Industries Fund (the Fund) within the United States Treasury. 18 U.S.C. 4126(a). Under the statute, all revenues received by FPI from the sale of its products and services, or from any other source, are held by the Treasury to the credit of the Fund. 18 U.S.C. 4126(a). Correspondingly, the statute provides that FPI may employ the Fund as operating capital, to lease, purchase, acquire and repair necessary equipment and buildings, to provide needed vocational training to inmates, and to compensate inmates for the work they do and for any injuries they suffer in connection with work activity. 18 U.S.C. 4126(c). FPI's enabling statute does not authorize FPI to receive, spend, or obligate general federal Treasury funds.

b. In June 1997, FPI awarded a marketing services contract to petitioner. Pet. App. 2a-3a. FPI exercised its option to terminate the contract effective April 1999. *Id.* at 3a. Petitioner submitted claims for termination costs under the contract, but FPI's contracting officer denied recovery. *Id.* at 26a-29a. Petitioner filed a suit for damages in the United States Court of Federal Claims in May 2000. *Id.* at 29a-30a.

The Court of Federal Claims dismissed the action for lack of subject matter jurisdiction under the Tucker Act, holding that FPI is a "non-appropriated fund instrumentality." Pet. App. 18a-19a. Relying on the statute that created FPI, its history, and earlier Federal Circuit and Court of Federal Claims decisions, the trial court held that "Congress has decreed that [FPI] is to operate without appropriated funds." *Id.* at 18a (citing *Furash & Co.*, 252 F.3d at 1339, and *Aaron* v. *United States*, 51 Fed. Cl. 690, vacated in part not relevant, 52 Fed. Cl. 20 (2002)). The court explained that FPI only "employs funds derived from the sale of prod-

ucts or by-products by [FPI] or services of federal prisoners." *Ibid.* "Congress," the Court of Federal Claims concluded, "has separated [FPI] from general federal revenues." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-14a. The court of appeals began by explaining that, although the Tucker Act does not provide jurisdiction over actions against NAFIs (except those specifically listed as a result of the 1970 amendments, such as PXs, see pp. 3-4, *supra*), the non-appropriated funds doctrine will be found inapplicable "absent a '[cl]ear expression by Congress that it intended to separate the agency from general federal revenues.'" Pet. App. at 4a-5a (quoting *Furash*, 252 F.3d at 1339). Thus, to establish jurisdiction, the plaintiff "need not show that appropriated funds have actually been used." *Id.* at 5a. Instead, the question is whether Congress "intended to absolve the appropriated funds of the United States from liability for [the instrumentality's] acts." *Ibid.*

Applying that standard here, the Federal Circuit concluded that petitioner's claim was "properly dismissed * * * for lack of jurisdiction under the non-appropriated funds doctrine." Pet. App. 6a. First, "FPI does not operate with appropriated funds." *Ibid.* Instead, "[i]t is a self-sufficient corporation whose funds are derived primarily from its product sales, and it receives no congressional appropriations." *Id.* at 6a-7a. Second and more importantly, the court of appeals concluded that "FPI's funding," as "understood from FPI's enabling legislation," *id.* at 7a, reflected Congress's "intent that the agency * * * is to be separated

from general federal revenues," *id.* at 9a. The court explained:

> By directing that all monies under FPI's control be deposited into the U.S. Treasury to the credit of the Prison Industries Fund, § 4126 makes clear that FPI's funds are to be kept distinct from general federal revenues. * * * Notably, FPI's enabling legislation includes "no authorization of appropriations, such as is usually found in the statutory charters of governmental entities which may rely on such appropriations in whole or in part." * * * Moreover, several congressional reports relating to FPI's operations provide evidence of Congress's own understanding that FPI is to operate entirely without appropriated funds.

Id. at 9a-10a. The court of appeals also explained that, although 18 U.S.C. 4126 does not "expressly prohibit Congress from appropriating funds" for FPI, Pet. App. 9a, the absence of express statutory authority for the use of appropriated funds confirms Congress's intent "to absolve appropriated funds from liability for FPI's actions," *id.* at 10a.

The court of appeals rejected petitioner's categorical position that, under General Accounting Office (GAO) rulings, all "revolving" agency funds held in the Treasury constitute "continuing appropriations." Pet. App. 10a-11a. The court determined that none of the three cited authorities—the Miscellaneous Receipts Act, 31 U.S.C. 3302; the Appropriations Clause of the United States Constitution Art. I, § 9, Cl. 7; and the definition of "appropriations" in 31 U.S.C. 701(2)(C) and 1101(2)(C)—operates to "transform FPI's funds, which reside in an independent account within the Treasury, into general funds of the United States that can be used

to pay judgments" under the Tucker Act. Pet. App. 12a.

Finally, the court of appeals rejected petitioner's contention that the Contract Disputes Act (CDA), 41 U.S.C. 612(c), permits a judgment against FPI to be paid from the judgment fund, 31 U.S.C. 1304. Pet. App. 12a-13a. The court noted that *Furash*, 252 F.3d at 1343, already held that Congress did not intend the CDA to expand the subject matter jurisdiction of the Court of Federal Claims and that "lack of jurisdiction under the Tucker Act amounts to lack of jurisdiction under the CDA." Pet. App. 13a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The Tucker Act confers on the Court of Federal Claims jurisdiction over, among other things, certain contract claims against the United States. See 28 U.S.C. 1491. As the Federal Circuit observed—and as petitioner has never disputed—the jurisdictional grant of the Tucker Act is nonetheless "limited * * * by the general requirement that judgments awarded against the government be paid out of appropriated funds." Pet. App. 4a; see 28 U.S.C. 2517(a) ("every final judgment" of the Court of Federal Claims must be "paid out of any *general appropriation* therefor") (emphasis added). It is thus common ground that "absent some specific jurisdictional provision to the contrary, the Court of Federal Claims generally lacks jurisdiction over actions in which appropriated funds cannot be obligated." Pet. App. 4a.

Petitioner does not dispute that, in determining whether a judgment may be paid out of general appropriated funds, the federal courts have generally reviewed the statutes establishing the defendant instrumentality to determine whether Congress sought to separate that instrumentality from general federal revenues. For example, in *Kyer* v. *United States*, 369 F.2d 714 (1966), cert. denied, 387 U.S. 929 (1967), the Court of Claims concluded that an alleged breach of contract by the Grape Crush Administrative Committee was not actionable under the Tucker Act because Congress had intended the Committee to be part of a "self-funding scheme" financed by assessments on producers rather than appropriations of general federal funds. *Id.* at 718. "[P]ublic funds were not made available to the Committee nor was the Committee in any sense authorized to obligate such funds." *Id.* at 719.

Similarly, in *Furash & Co.* v. *United States*, 252 F.3d 1336, 1339-1342 (2001), the Federal Circuit held that the Federal Housing Finance Board was a non-appropriated fund instrumentality "funded through assessments against federal home loan banks, not from general fund revenues," *id.* at 1340, with receipts "to be maintained distinct from general funds even when deposited with the Treasury," *id.* at 1341. Finally, in *Research Triangle Institute* v. *Board of Governors of the Federal Reserve System*, 132 F.3d 985, 989 (4th Cir. 1997), cert. denied, 525 U.S. 811 (1998), and *Denkler* v. *United States*, 782 F.2d 1003, 1005 (Fed. Cir. 1986), the Fourth and Federal Circuits concluded that the Board of Governors of the Federal Reserve System is a non-appropriated fund instrumentality given the Board's statutory source of funding—assessments levied on member banks rather than general Treasury revenues —and "the absence of the conventional language" in 12

U.S.C. 241-244 and 248 "authorizing funds to be appropriated" or used for the Board's support.

The same analysis applies here. No "general appropriation" is available to pay a judgment under the Tucker Act because Congress has plainly manifested its intent to isolate FPI from general federal revenues. Like the provisions establishing the Grape Crush Administrative Committee in *Kyer*, the Federal Housing Finance Board in *Furash*, and the Board of Governors of the Federal Reserve System in *Research Triangle* and *Denkler*, the enabling statute that establishes FPI does not make or authorize any appropriations. Rather, Congress established a discrete and permanent corporate balance sheet for FPI distinct from general Treasury revenues. Under 18 U.S.C. 4126, "[a]ll moneys" accruing to FPI from its activities must "be deposited or covered into" a segregated account within the Treasury, 18 U.S.C. 4126(a), with "[a]ll valid claims and obligations" to be "payable out of said fund." 18 U.S.C. 4126(b). Thus, while FPI may employ its earnings as operating capital, to lease, purchase, acquire and repair necessary equipment and buildings, to provide needed vocational training to inmates, and to compensate inmates for the work they do and for any injuries they suffer in connection with their work, 18 U.S.C. 4126(c), FPI's enabling statute nowhere authorizes FPI to spend or obligate general federal Treasury funds.

As the Federal Circuit observed:

> By directing that all monies in FPI's control be deposited to the credit of the Prison Industries Fund, § 4126 makes clear that FPI's funds are to be kept distinct from general federal revenues. * * * Notably, FPI's enabling legislation includes "no authorization of appropriations, such as is usually

> found in the statutory charters of government entities which may rely on such appropriations in whole or in part." * * * Moreover, several congressional reports relating to FPI's operations provide evidence of Congress's own understanding that FPI is to operate entirely without appropriated funds.

Pet. App. 9a-10a. Consistent with that design, for the nearly 70 years of FPI's existence, no appropriations act has provided federal budget dollars to the corporation. See *Aaron*, 51 Fed. Cl. at 692-693; *In re Donation Under 40 U.S.C. 484(j) of Surplus Pers. Prop. of Fed. Prison Indus., Inc.*, 60 Comp. Gen. 323, 326 (1981).[1]

Half a century of precedent supports application of the non-appropriated fund doctrine in such circumstances. See *Borden* v. *United States*, 116 F. Supp. 873, 877 (Ct. Cl. 1953) (holding military post exchanges to be NAFIs where "profits * * * deposited in the Treasury" were "not placed in the general fund, but in a special fund for the use of other post exchanges"); *Furash*, 252 F.3d at 1341 (holding Federal Housing Finance Board to be a NAFI outside the scope of the Tucker Act because, under 12 U.S.C. 1422b(c), "Finance Board funds are to be maintained distinct from general funds even when deposited with the Treasury"); *McCloskey & Co.* v. *United States*, 530 F.2d 374, 376-377 (Ct. Cl. 1976) (holding District of Columbia Armory

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[1] Soon after its creation in 1934, FPI repaid to the Treasury, as dividends, an amount equal to the funds previously appropriated for the Department of Justice that were credited to FPI under the 1934 Act. 60 Comp. Gen. at 326; see Act of June 23, 1934, ch. 736, § 4, 48 Stat. 1211.

Board, funded by "permanent revolving working capital fund," to be a NAFI).[2]

2. Petitioner nonetheless argues (Pet. 13-14) that the judgment below is inconsistent with this Court's decision in *Paul* v. *United States*, 371 U.S. 245, 261-263 (1963), and the D.C. Circuit's decision in *United Biscuit Co. of America* v. *Wirtz*, 359 F.2d 206, 212-213 (1965), cert. denied, 384 U.S. 971 (1966). Those cases, petitioner asserts, stand for the proposition that "Government contracts made with revolving, or working capital, funds" such as the Federal Prison Industries Fund "are made with appropriations." Pet. 13. That assertion is without merit.

As an initial matter, neither *Paul* nor *United Biscuit Co.* concerned application of the non-appropriated fund doctrine for purposes of Tucker Act jurisdiction. *Paul* concerned a pre-emption question—whether the State of California could regulate the prices to be charged to the United States for milk to be used and sold on military bases. See 371 U.S. at 247. And *United Biscuit Co.* concerned whether military commissary purchases were subject to the Walsh-Healey Act, 41 U.S.C. 35-45, which imposed minimum wage and labor standards for entities entering into contracts with the government. Neither case addressed the scope of Tucker Act jurisdiction.

Furthermore, far from conflicting with the Federal Circuit's decision here, those decisions support it. In

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[2] Petitioner correctly concedes that the Contract Disputes Act does not provide the Court of Federal Claims with jurisdiction over non-appropriated fund instrumentalities where the Tucker Act does not. See Pet. 2 ("This same non-appropriated funds doctrine applies also to proceedings under the Contracts Disputes Act."); see also *Furash*, 252 F.3d at 1343.

Paul, for example, this Court addressed three different types of federal milk purchases—purchases for military mess halls, purchases for military commissaries, and purchases for military PXs. The milk for the PXs, the Court observed, "was purchased out of non-appropriated funds." 371 U.S. at 263; see *id.* at 247-248. That supports the decision below, because FPI is structured and operates just like the PXs in *Paul*: Neither receive appropriated monies from the federal treasury; both use only the monies received from their sales; and both keep their income in a special Treasury account segregated from general federal Treasury revenues. See *Borden*, 116 F. Supp. at 877 (military post exchange placed the profits from its sales "in the Treasury," not "in the general fund, but in a special fund for the use of other post exchanges").

While petitioner relies on this Court's statement that the milk for military *commissaries* was purchased using appropriated monies, Pet. 14, petitioner ignores the critical difference between FPI and the military commissaries at issue in *Paul*: While FPI operates using—and only has access to—the money it earns from its own operations and places in a segregated account, Congress provided military commissaries with access to public money drawn from general federal Treasury revenues. Thus, this Court's decision in *Paul* cited a statute (Independent Offices Appropriation Act, 1962, Pub. L. No. 87-141, § 613, 75 Stat. 377-378) authorizing the military to use public money drawn from general Treasury revenues to pay for commissary purchases. 371 U.S. at 262 & nn.27, 29. Likewise, in *United Biscuit Co.*, the D.C. Circuit relied on the fact that military commissary purchases were "made from appropriated funds" that were "*replenished by moneys from the public.*" 359 F.2d at 212 (emphasis added). Indeed, the

D.C. Circuit cited a statutory provision authorizing commissary funds to be "*reimbursed from available appropriations*." *Id.* at 212 n.12 (citing Section 405(c)(2) of the National Security Act Amendments of 1949, ch. 412, 63 Stat. 587-588) (emphasis added); see *ibid.* (quoting Section 405(d) of the National Security Act Amendments of 1949 (63 Stat. 588), which not only provides that working capital accounts for commissaries may be established by transferring the "unexpended balances of any appropriations" but declares that, if such amounts prove inadequate, "there is hereby appropriated * * *, out of any moneys in the Treasury not appropriated for other purposes, such sums as may be necessary").[3]

Petitioner cites no comparable provision providing for FPI to receive or be reimbursed from appropriated sums. Consequently, neither *Paul* nor *United Biscuit Co.* contradicts the court of appeals' conclusion here—that FPI is properly considered a non-appropriated fund instrumentality because Congress provided that it would be funded *entirely* from its own sales, limited FPI to drawing from and depositing earnings into a *segregated* Treasury account designated solely for its use, and nowhere provided for FPI to *use* or for FPI's accounts to be *replenished* from public money appropriated from general Treasury funds.

In any event, petitioner's fundamental submission—that use of a "revolving" account within the Treasury

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[3] The Armed Services, the District of Columbia Circuit also explained, had "conducted their entire purchasing program for commissaries under the belief that moneys paid out of the stock funds were appropriated," and any separate accounting for those funds had been established merely as a matter of "administrative convenience." *United Biscuit Co.*, 359 F.2d at 212-213.

automatically precludes any entity from being a non-appropriated fund instrumentality—is impossible to reconcile with fifty years of precedent. In case after case, the Federal Circuit and its predecessor courts have held that instrumentalities with such accounts can be non-appropriated fund instrumentalities if Congress segregates the funds and thereby indicates an intent to separate the instrumentality from general federal Treasury revenues. *Borden*, 116 F. Supp. at 877 (military post exchange with "special fund" in the Treasury); *Furash*, 252 F.3d at 1341 (Federal Housing Finance Board with accounts "distinct from general funds even when deposited with the Treasury"); *McCloskey*, 530 F.2d at 376-377 (similar). The question is not whether the entity has an account within the Treasury where it must deposit earnings and from which it draws funds for its operations. Rather, the question is whether Congress intended to limit the instrumentality to spending—and obligating—only the non-appropriated sums it collects through its own operations.

Petitioner's assertion that all government revolving funds in the Treasury are "appropriated funds" for purposes of determining Tucker Act jurisdiction, regardless of source or segregation, is also difficult to reconcile with this Court's cases. In *Paul*, this Court recognized that military post exchanges operate using non-appropriated funds, even though post exchanges deposit their earnings into and draw from a special, segregated Treasury account. See p. 13, *supra*. Furthermore, before the 1970 amendments to the Tucker Act, this Court observed that, while post exchanges operate as arms of the United States, the "Government assumes none of the financial obligations of the ex-

change[s]." *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942).

For similar reasons, petitioners' reliance (Pet. 16) on statutes creating other revolving and working capital funds is misplaced. To the extent that those statutes are relevant, they merely confirm that *some* such funding mechanisms receive congressional appropriations of public money—not that *all* do. See, *e.g.*, 10 U.S.C. 2208(d) (authorizing appropriations for Department of Defense working capital funds); 15 U.S.C. 1521 (appropriating $100,000 for centralized Department of Commerce services, "said fund to be reimbursed from applicable funds of bureaus, offices, and agencies for which services are performed"); 40 U.S.C. 293 (appropriating $50,000 for the establishment of a document reproduction fund for the General Services Administration to be reimbursed from "available funds" of federal agencies); 43 U.S.C. 50a (providing that the United States Geological Survey working capital fund "shall be credited with appropriations and other funds of the Survey, and other agencies of the Department of the Interior, other Federal agencies, and other sources"). Here, by contrast, Congress has chosen *not* to authorize appropriations of general federal Treasury funds to FPI; nor has it chosen to authorize FPI to spend or obligate such public funds.[4]

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[4] The administrative board decisions cited by petitioner (Pet. 19) are uninstructive because they plainly involved appropriated revolving funds. *EROS Div. of Res. Recycling Int'l, Inc.*, ASBCA No. 48,355, 99-1 B.C.A. (CCH) ¶ 30,207 (1998) (concerning 10 U.S.C. 2208), aff'd, 232 F.3d 912 (Fed. Cir. 2000) (Table); *Pulsar Data Systems, Inc.* v. *GSA*, GSBCA No. 13,233, 96-2 B.C.A. (CCH) ¶ 28,407 (1996) (concerning 40 U.S.C. 293). Indeed, no party in either case argued that the fund at issue was a NAFI. In *EROS*, the contractor argued that an appropriation was unnecessary to

3. Finally, petitioner cites (Pet. 18) opinions issued by the Comptroller General to the effect that revolving funds are always considered "continuing appropriation[s]." As the Federal Circuit correctly recognized, "the Comptroller General's view of what constitutes an appropriation [has] appeared in the context of interpreting particular regulations" and does not directly bear on the scope of Tucker Act jurisdiction. Pet. App. 11a-12a.

Indeed, the GAO decisions cited by petitioner reflect distinct concerns. It may well be that, whenever money is placed in the Treasury, it is subject to exclusive congressional control under the Appropriations Clause —even if the money is derived from the activities of a specified federal instrumentality and placed in a segregated account for the sole and exclusive use of that instrumentality. Cf. *Republic Nat'l Bank* v. *United States*, 506 U.S. 80, 94 (1992) (opinion of the Court delivered by Rehnquist, C.J.) (discussing "the principle that once funds are deposited into the Treasury" they "may only be paid out pursuant to a statutory appropriation"); U.S. Const. Art. I, § 9, Cl. 7 (Appropriations Clause) ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

But the non-appropriated funds doctrine asks a different question, and uses the term "appropriated" in a different sense. The non-appropriated funds doctrine does not ask whether Congress has authorized money to be spent (in this case, from specialized funds established within the Treasury). It asks whether, in establishing a particular instrumentality as self-funding and

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fund its contract; in *Pulsar*, the agency argued that available appropriations were exhausted.

separating its funds from *general* federal revenues, Congress meant to render *general* appropriations unavailable to the instrumentality, to prevent the instrumentality from obligating *public money* and general federal Treasury revenues, and to make general federal Treasury funds unavailable to pay judgments against the instrumentality. Based on FPI's enabling legislation, the Federal Circuit correctly concluded that the answer to those questions in this case is "yes." Indeed, by establishing FPI as a self-funding organization that deposits earnings in a segregated fund and operates relying on those earnings alone, and by omitting any "authorization of appropriations" of public money "such as is usually found in the statutory charters of government entities which may rely on such appropriations in whole or in part," Pet. App. 9a, Congress evinced a clear intent to separate FPI and its operations from general public money in the Treasury.[5] Because the court of appeals' decision is both correct and does not conflict with the decision of any other court, further review is unwarranted.

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[5] Through 18 U.S.C. 4126, Congress clearly authorized FPI to draw on the funds it deposits in the Treasury into its segregated fund, thereby satisfying the Appropriations Clause. But Congress also evinced an intent not to finance FPI with public money held in the Treasury, or to provide a "general appropriation" of such funds for FPI's use. It is precisely such a general appropriation that would have to be used to pay any judgment in the Court of Federal Claims pursuant to 28 U.S.C. 2517(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2003